

as ad.
ORIGINAL

1. UNITED STATES DISTRICT COURT

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

2. DISTRICT OF HAWAII

SEP 21 2007

3. at 1 o'clock and 45 min P.M.
SUE BEITIA, CLERK

4. RICK VO

)
5.) CASE NO. 07-00052 ACR
6. V.) 02-00411 ACR
7.)
8. UNITED STATES OF AMERICA)

9.
10. MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RE-
11. CONSIDERATION OF U. S. C. SECTION 2255 MOTION,
12. AND REPLY TO GOVERNMENT'S RESPONSE OF MOTION

13. FOR RECONSIDERATION

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INTRODUCTION

4. Vo raises one (1) ground for relief: Denial of Effective
5. Assistance of Counsel Due to Counsel's Failure to Request a
6. Mistrial Based on Jury Intimidation or Tampering.

7. Vo specifically alleges that an incident of jury intimidation
8. or tampering occurred during his trial, which raised a presumption
9. of prejudice under Supreme Court and the Ninth Circuit precedent.
10. Vo's trial counsel, Michael Weight, was apprised of this
11. incident; but, due to lack of awareness of the case law in this
12. area, he failed to request a mistrial and/or evidentiary hearing
13. on the matter as the case law above required. Had counsel done
14. the former and/or latter, a mistrial would have been declared as
15. the government did not - and could not - overcome the presumption
16. of prejudice from the incident of jury intimidation or tampering.

17. These allegations, if true, would be sufficient to establish
18. that counsel's performance was deficient and that Vo was
19. prejudiced thereby. As this establishes a claim of Ineffective
20. Assistance of Counsel under Strickland v. Washington 466 U.S.
21. 668 (1984), Vo argues he is therefore entitled to an evidentiary
22. hearing so that he can establish this claim.

23.

FACTS

24. The government arrested Vo together with his wife, Brenda Vo
25. ("Brenda"), on October 6, 2002. Three days later, the government
26. indicted the Vos in two joint counts to possess over fifty grams
27. of methamphetamine with intent to distribute and with aiding and
28. abetting each other in the possession of over fifty grams of

1. methamphetamine with intent to distribute. The above charges
2. stemmed from Brenda's arrest in connection with her having mailed
3. a box containing methamphetamine from a Mail Boxes Etc. in Hawaii
4. to the Vo's residence in Playa del Rey, California in October of
5. 2002.

6. Brenda pled guilty to the conspiracy charge on April 17,
7. 2003; in exchange, the government moved to dismiss the aiding and
8. abetting count against her. After her plea, the government filed
9. a superceding indictment, which expressly noted that Brenda was
10. not a defendant.

11. The superceding indictment essentially replicated the
12. original conspiracy count, accusing Vo, in count 1, of conspiracy,
13. from about June, 2001 to about October 6, 2002, with Brenda and
14. unnamed others to distribute and possess with the intent to
15. distribute over fifty grams of methamphetamine in violation of
16. 21 U.S.C. §841 (a)(1). Similarly, count 2 of the superceding
17. indictment replicated the original aiding and abetting charge,
18. accusing Vo of aiding and abetting Brenda on or about October 4,
19. 2002, in the possession with the intent to distribute over fifty
20. grams (to wit, approximately fourteen pounds) of methamphetamine
21. in violation of U.S.C. §2 and 21 U.S.C. §841 (a)(1).

22. On May 14, 2003, Vo's trial began. On the second day of the
23. trial, after the jury had been selected (but out of their
24. presence during a recess) the court informed Vo's counsel,
25. Michael Weight, and the Assistant United States Attorney, Tom
26. Muehleck ("AUSA Muehleck"), that it received a report from juror
27. number three (3), Mr. Hanki ("Mr. Hanki"), that he heard someone
28. in the court cafeteria, whom he thought might have been a DEA

1. witness, saying that one of the jurors was "frowning" (Exhibit
 2. "A") (Declaration of Rick Vo in support of §2255 Motion) ("Vo's
 3. Decl"). ¶2¹

4. The court noted that the circumstances surrounding this
 5. incident was not "that clear," (Id.), and asked both Mr. Weight
 6. and AUSA Muehleck whether they "want(ed) to do anything more
 7. about this." (Id.). Mr. Weight responded that he thought "all
 8. that would do would be to emphasize the matter," and that he
 9. thought "it's better left alone." (Id.). Mr. Weight did not
 10. know at that time the above incident involving Mr. Hanki had
 11. raised a presumption of prejudice under Supreme Court and Ninth
 12. Circuit precedent and that it was grounds for a mistrial.
 13. (Id. at ¶3).

14. AUSA Muehleck did not directly respond to the court's
 15. question above. Rather, as to the question of whether the person
 16. that Mr. Hanki overheard in the federal court cafeteria was in
 17. fact a DEA witness, he "object(ed) to that on the record without
 18. more information." (Id. ¶2). The court concluded the
 19. discussion by saying "the juror [(Mr. Hanki)] thought it was a
 20. DEA witness, but he wasn't sure. He didn't have a precise
 21. recollection." (Id.).

22. Thereafter, Vo's trial immediately resumed. (Id.) No
 23. further discussion of Mr. Hanki or the incident above arose and
 24. no one ever questioned Mr. Hanki or any other jurors about the
 25. matter during Vo's trial. (Id. at ¶4). The jury ultimately

26.
 27. 1/ Attached to Vo's Decl. as "Exhibit A" is a true and correct
 28. copy of excerpts of Vo's trial transcripts.

1. found Vo guilty of aiding and abetting Brenda Vo as charged in
2. count 2 of the superceding indictment. The jury failed to return
3. a verdict on the alleged conspiracy charged in count 1.

4. On December 15, 2003, the District Court sentenced Vo to
5. 262-months imprisonment and a ten-year term of supervised release.
6. Vo's appeal to the Ninth Circuit was denied on June 27, 2005. See
7. U.S. v. Vo, 413 F.3d 1010 (Ninth Circuit 2005). His petition for
8. writ of certiorari was likewise denied by the Supreme Court on
9. November 28, 2005.

TIMELINESS

The government, in their response, argues that Petitioner's motion is untimely. However, petitioner did file within the 10 day period. Petitioner received notice of the decision denying his § 2255 motion on Tuesday, July 3, 2007. The 10 day period begins to count from this day. Petitioner, then responded on Tuesday, July 17, 2007. Pursuant to the "prison mailbox rule" for pro se petitioners, the date of filing is deemed to be the date the prisoner deposits the motion in the prison's mailbox. A total of 9 business days, well within the filing deadline, the issue of whether to treat this motion as a FRCP 59 or FRCP 60 is mute. The petitioner clearly filed this motion within 10 days, therefore it is without a doubt a FRCP 59(e) motion.

THE COURT'S RULING

24. This memorandum of law will unambiguously show that this
25. Honorable Court erred in ruling on the jury tampering claim with-
26. out holding an evidentiary hearing to investigate the effect, or
27. lack of effect, the incident had on the jury. The clear manifest
28. error committed by the court, further requires the the Court re-

1. consider its decision of the denial of petitioner's § 2255 motion
 2. to vacate, set aside or correct sentence. Petitioner respectfully
 3. requests that this Court order an evidentiary hearing to determine
 4. such effects on the peace of mind of the jurors. The right to be
 5. tried by a jury that is free of biases, or corruption from any
 6. source to include that of the government's is guaranteed by the
 7. Sixth Amendment. This is further explained in the memorandum of
 8. law in support of motion for reconsideration.

9.

10. B. INEFFECTIVE ASSISTANCE OF COUNSEL

11. It is well settled that the Sixth Amendment guarantees
 12. criminal defendant's the right to effective assistance of counsel.
 13. Strickland, supra.

14. To prevail on such a claim under Strickland, a petitioner
 15. must establish (a) that his counsel's representation was outside
 16. the wide range of professional competent assistance, and (b) that
 17. he was prejudiced by reason of his counsel's representation. Id.
 18. 1t 668. An attorney's performance is deficient if it falls below
 19. an "objective standard of reasonableness." Id. See also Leonti;
 20. 326 F.3d at 1120.

21. The concept of ineffective assistance of counsel applies in
 22. the context of counsel's handling of jury matters. See Fields
 23. v. Woodford, 281 F.3d 963, 977-73 (9th Cir, 2002)(citing cases);
 24. Government of Virgin Islands v. Weatherwas 20 F.3d 572 (3rd Cir,
 25. 1994); Davidson v. U.S., 951 F.Supp. 555 (W.D. Pa. 1996).

26. II. VO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL
 27. DUE TO COUNSEL'S FAILURE TO REQUEST A MISTRIAL
 28. BASED ON JURY INTIMIDATION OR TAMPERING.

The questions posed in the present § 2255 motion are (1)

1. whether there was in fact an instance of jury intimidation or
 2. tampering during Vo's trial; (2) if so, whether Vo's counsel was
 3. deficient in failing to raise the issue by requesting a mistrial
 4. and/or, at minimum, an evidentiary on the issue; and (3) whether
 5. Vo was prejudiced as a result. Vo will discuss each of these
 6. issues in turn below.

7. A. Jury Intimidation or Tampering

8. The Sixth Amendment guarantees criminal defendants a verdict
 9. by impartial and indifferent jurors. U.S. v. Rutherford, 371
 10. F.3d, 634, 641 (9th Cir, 2004). To protect this right, in
 11. Mattox v. U.S., 146 U.S. 150, 151, 13 S. Ct. 50, 36 L. Ed. 917
 12. (1892), the Supreme Court held that "[p]rivate communications,
 13. possibly prejudicial, between jurors and third parties or
 14. the officer in charge, are absolutely forbidden and invalidate the
 15. verdict, at least unless their harmlessness is made to appear."

16. See also Rutherford, Id.

17. Subsequently, in Remmer v. U.S., 347 U.S. 227, 74 S. Ct. 450,
 18. 98 L. Ed. 654 (1954) ("Remmer I"), the court established that any
 19. "private communication, contact or tampering, directly or
 20. indirectly, with a juror during a trial about the matter pending
 21. before the jury" is deemed "presumptively prejudicial" and placed
 22. a heavy burden on the government to rebut the presumption by
 23. proving that the error was harmless beyond a reasonable doubt.
 24. Id. at 229, 74 S. Ct. 450. See also Rutherford, Id. In
 25. Rutherford, the Ninth Circuit stated:

26. "The importance of the application of the
 27. presumption cannot be overstated, where a juror
 28. is improperly contacted during a trial, the
 potential for prejudice is significant, but it
 is often very difficult for the defendant to

1. prove."

2. Id. at 641 (citation omitted).

3. In Remmer v. U.S., 350 U.S. 377, 382, 76 S. Ct. 425, 100
4. L.Ed. 435 (1956) ("Remmer II"), the court suggested that only
5. "unauthorized intrusions" into the "sanctity of the jury's right
6. to operate as freely as possible" purposefully made might trigger
7. the presumption of prejudice. Id. at 382, 76 S. Ct. 425.

8. Rutherford, Id. Shortly thereafter, however, in a case in which
9. intent was admittedly lacking the court clarified the issue
10. holding that, under Remmer II, the "fact that the intrusion was
11. unintentional does not remove the effect of the intrusion."

12. Gold v. U.S., 352 U.S. 985, 77 S. Ct. 378, 1 L.Ed. 2nd 360 (1957)
13. (per curiam) (emphasis added).

14. The Ninth Circuit has applied the Mattox/Remmer rule in a
15. number of cases and, in line with Gold, have consistently stated
16. that the appropriate inquiry is whether the unauthorized conduct
17. or contact is "potentially prejudicial" not whether the parties
18. alleged to have tampered with the jury did so intentionally.

19. See Rutherford, 371 F.3d at 642 (citing cases). See also
20. U.S. v. Elias, 269 F.3d, 1003, 1020 (9th Cir. 2001)(noting that
21. courts look not to the "intent of the individual alleged to have
22. tampered with the jury," but rather to "the jurors' perceptions
23. of the conduct at issue.").

24. In short, in cases in which the circumstances suggest that
25. the improper communication or contact is "sufficiently serious"
26. that it might prejudice the jurors, the Ninth Circuit has
27. afforded the presumption of prejudice; in the case of other more
28. "prosaic kinds of jury misconduct," or "where the improper

1. contact with jurors has been de minimis," the court has not.
 2. Rutherford, 371 F.3d at 643. See id. (citing cases discussing the
 3. difference). See also, Caliendo v. Warden of California Mens
 4. Colony, 353 F.3d, 1147, 1151-52 (9th Cir. 2004). In the latter
 5. circumstances, "courts have departed from Mattox and placed the
 6. burden on the defendant to establish prejudice." Id. See also
 7. U.S. v. Brande, 329 F.3d 1137, 1176077 (9th Cir. 2003) (same).

8. The case law above compels the conclusion that the improper
 9. contact involving Mr. Hanki in this case was "sufficiently
 10. serious" and thus raised a "presumption of prejudice" and
 11. required that an evidentiary hearing be held on the matter.
 12. Rutherford and Brande are particularly instructive here.

13. In Rutherford, for example, the defendant obtained post
 14. trial affidavits from various jurors pertaining to events that
 15. occurred during the trial. Therein, one juror stated:

16. "[D]iscussion as to possible retaliation against
 17. jurors by certain IRS auditors resulted because there
 18. were a number of IRS employees who attended the trial
 19. were present every day, and every time I looked at them
 20. they seemed to be glaring at the jury. This was very
 21. unsettling to some of (sic) the jurors."

22. Rutherford, 371 F.3d at 638 (emphasis added).

23. Based on these affidavits, the defendant in Rutherford filed
 24. a "rule 33" motion for a new trial wherein he argued that he was
 25. entitled to this relief under the Mattox/Remmer line of cases.
 26. Id. at 639. The district court held a hearing on the issue.

27. Id. The district court struck portions of the jurors' affidavits
 28. on the basis that much of the statements therein were
 29. inadmissible under "Fed. R.Evid. 606(b)" as constituting evidence
 30. of the jurors' "mental processes" concerning "the verdict." Id.

1. The only statement that the court found that could provide the
2. basis for a Mattox/Remmer claim was the juror's "statement
3. regarding the presence of so many 'glaring' IRS agents in the
4. courtroom." Id.

5. The district court ultimately ruled, however, that because
6. the defendant could not prove that the "glaring" agents "intended
7. to intimidate or influence the jurors," the agents' conduct had
8. to be "considered as a more prosaic form of contact with the
9. jurors" and that the defendants thus had the burden of proving
10. actual prejudice. Id. Because the defendants could not meet this
11. burden, the court denied their motion for a new trial. Id.
12. The Ninth Circuit reversed and remanded for a further evidentiary
13. hearing.

14. The Rutherford court first noted that the conduct at issue
15. was that of "government agents," and that courts have emphasized
16. that "judges should exercise additional caution when government
17. employees are involved because of the heightened concern that the
18. jurors will not 'feel free to exercise [their] functions' with
19. the government looking over [their] shoulder[s].'" Id. at 643
20. (citation omitted). Indeed, the court noted that the Ninth
21. Circuit has held "even seemingly innocuous juror conversation
22. and contact between such individuals and a juror can trigger a
23. presumption of prejudice." Id.

24. The court specifically ruled "that the district court erred
25. in concluding the defendant must prove that the individual[]
26. [FBI] agents involved **intended** to influence or prejudice the
27. jurors in order for the presumption of prejudice to apply." Id.
28. at 644 (emphasis added). The court stated that "[t]he

1. appropriate inquiry is whether the unauthorized conduct 'raises a
2. risk of influencing the verdict,'...or had an adverse effect on
3. the deliberations." Id. (citation omitted). But because the
4. court also ruled that the district court had also "erred [under
5. Fed. R.Evid. 606(b)] in limiting juror testimony at the
6. evidentiary hearing to the existence of such conduct at the same
7. time it occurred," and the record was thus "incomplete," it did
8. not determine whether the presumption should apply and whether the
9. jurors were adversely influenced by the agents' conduct at trial.
10. Id.

11. Rather, the court left the latter task to the district court
12. following the holding of a "further evidentiary hearing." The
13. court expressed "no opinion as to the results on remand." Id.
14. However, the court did state "that standing alone, the mere
15. attendance of seven to 10 agents at trial is not grounds for
16. applying the presumption of prejudice, or, for that matter,
17. granting a new trial." Id. The court nevertheless concluded that
18. "glaring and staring at jurors on a regular basis may be another
19. matter." Id. (emphasis added).

20. In Brande, after the defendant had been found guilty, but
21. before sentencing, he learned that during the course of the trial
22. that a juror was overheard (by other members of the jury) saying
23. "something to the effect of he was unable to find anyone guilty
24. because of his religious beliefs.", 329 F.3d at 1175. Two jury
25. members reported this to "either a clerk of the court or court
26. intern," who "then approached that juror and asked him whether he
27. would be unable to find a defendant guilty of a crime." Id. The
28. juror in question responded that "he would not be unable to do

1. so." Id.

2. Five months after learning of the latter incident, counsel
 3. brought it to the court's attention and "suggested that the court
 4. hold an evidentiary hearing on the matter." Id. The court
 5. refused to hold a hearing on the basis that "the defense had
 6. waited so long before bringing the matter to its attention." Id.
 7. at 1176. The Ninth Circuit reversed and remanded with
 8. instructions that the district court hold an evidentiary hearing
 9. to determine whether "the contact between the juror and the court
 10. employee" required a new trial.

11. The Brande court noted the Ninth Circuit's rule that the
 12. "more prosaic kinds" of conduct did not raise a presumption of
 13. prejudice or require a hearing. The court then stated:

14. "To determine whether an evidentiary hearing must
 15. be held, [under Remmer I], the court must consider the
 16. content of the allegations, the seriousness of the
 17. alleged misconduct or bias and the credibility of the
 source...If these factors warrant holding a hearing,
 a hearing should be held unless the court already knows
 'the exact scope and nature' of the improper contact."

18. Id. at 1176-77 (citations omitted) (emphasis added).

19. The "credibility" of the allegations in Brande were "not in
 20. doubt, only their seriousness." Id. Three factors lead the
 21. court to conclude that the allegations were "serious enough" to
 22. raise a presumption of prejudice under Remmer I, and thus
 23. "warrant a hearing":

24. "First, the conduct was between a juror and court
 25. personnel. The defendants are correct that juror is
 26. more susceptible to improper influence from a court
 27. officer than from spectators or parties to the case.
 See Parker v. Gladden, 385 U.S. 363, 365, 87 S. Ct.
 468 L.ED. 2d 420 (1996) (percuriam). Second, the
 communication concerned the central duty of a juror-
 deciding guilt - and may have had the effect, intended

1. or not, of influencing the juror's exercise of that
 2. duty. See United States v. Plunk, 153 F.3d 1011,
 1023 (9th Cir. 1988) (distinguishing "Substantive
 3. contact" from contact related to providing for
 physical need of jurors). Third, because the
 4. ex parte contact came to light only after the
 verdict, there was no opportunity for a curative
 5. instruction, 197 F.3d at 981 (9th Cir. 1999)
 (citing adequate curative instruction in finding
 6. the jury not tainted); United States v. English,
 25 C.C.P.A. 770, 92 F.3d 909, 914 (9th Cir. 1996)
 7. (same).

8. "The government may turn out to be correct that
 9. the communication was not prejudicial. In this
 instance, however, it is impossible to know whether
 there was prejudice without an evidentiary hearing."

10. Id. (citation omitted) (emphasis added).

11. Turning to the present case, as in Brande, the "contact" and
 12. "credibility" of the allegations of improper contact here are not
 13. (and cannot be) "in doubt, only their seriousness.³ Id. at
 14. 1176-77. Three specific factors compel the conclusion that the
 15. improper conduct here was "sufficiently serious" to raise a
 16. 'presumption of prejudice.'"

17. First, the conduct at issue was that of "government
 18. agents."⁴ This, as noted, was a significant factor in both
 19. Brande and Rutherford, which lead the court to conclude that
 20. further inquiry was necessary. See id. at 643 ([E]ven seemingly
 21. innocuous juror conversations and contact between [government
 22. agents] and a juror can trigger a presumption of prejudice").

23. 3/ Indeed, the juror at issue in this case, Mr. Hanki himself
 24. brought the improper contact to the court's attention.

25. 4/ Any argument that the government may make as to the record
 26. not clearly showing that it was in fact a government
 27. agent/witness that Mr. Hanki overheard (as it indicated it would
 28. during Vo's trial (TT April 20, 2005 p. 3-6)) would be misplaced,
 as the Ninth Circuit has made it clear that it is the "jurors'
 perception" that matters.

1. Second, there was "no...curative instructions" given in this case
 2. that could have neutralized any potential harm. This was another
 3. factor that lead the court in Brande to find that the allegations
 4. were serious enough in that case to require a hearing. Id. at
 5. 1177. Third, and perhaps most important, there can be no
 6. question that the improper contact in this case "disturbed"
 7. Mr. Hanki and caused him concern, which is obvious from the fact
 8. he brought it to the court's attention in the first instance.
 9. The Supreme Court found this to be a significant factor in
 10. Remmer II. See id. at 427:

11. "Smith [(the juror in question)] was disturbed.
 12. As he later testified, "I always felt whether Mr. Satterly
 13. said it [(i.e. offered a bribe)] in so many words or not,
 14. I always felt that money was involved; otherwise why
 15. would any question be put to me." So disturbed was Smith
 16. that he told the trial judge about it."

17. Id. (emphasis added).

18. Moreover, the improper contact at issue (at least arguably)
 19. "directly concerned the trial." To be sure the record indicates
 20. that the alleged government agent witness in question was
 21. informing another agent or some other court personnel⁵ that a
 22. juror was "frowning" during the course of the trial as evidence
 23. and/or arguments were being presented. Cf. Brande, 329 F.3d at
 24. 1177; Caliendo, 353 F.3d at 1153.

25. But regardless, the misconduct here - like the juror
 26. misconduct in Caliendo - went beyond "a mere inadvertent or
 27. accidental contact involving only an exchange of greeting in
 28. order to avoid an appearance of courtesy." Id. (citation

27. 5/ The federal "court cafeteria" is of course not open to the
 28. general public.

1. omitted). See also U.S. v. Angulia, 4 F.3d 843, 847 (9th Cir.
 2. 1993) (citing cases where the alleged misconduct was not
 3. considered serious enough to warrant a hearing which are clearly
 4. distinguishable from the case at bar).

5. Indeed, the misconduct here very well may have "prevented
 6. [Mr. Hanki] from thinking about the evidence or paying attention
 7. to the judge's instructions, "Rutherford, 371 F.3d at 642, in
 8. that it could have caused him to be more concerned with his
 9. facial expressions and not drawing obviously unwanted attention,
 10. thereby, from government agents/witnesses - who had
 11. (intentionally or unintentionally) made it clear to him that they
 12. were watching for this. See id. ("Jurors must feel free to
 13. exercise [their] functions 'with[out]' the government looking
 14. over [their] shoulder[s]."). (Quoting Remmer I, 347 U.S. at
 15. 229.) In short, the government agents' conduct at issue here was
 16. certainly more serious than the "glaring" in Rutherford, which
 17. in itself caused the Ninth Circuit to remand, as they affirmatively
 18. informed Mr. Hanki they would be "looking" for adverse juror signs.

19. Accordingly, Vo has met his burden of showing that the
 20. misconduct here was "sufficiently serious" to raise a
 21. "possibility of prejudice." Therefore, as the record shows that
 22. the district court made no attempt to determine the "exact scope
 23. and nature" of the "improper contact,"⁶ a presumption of
 24. prejudice arose in this case requiring an evidentiary hearing.
 25. Brande, 329 F.3d at 1177.

26. 27. 6/ To be sure the trial transcript reveals that the court stated
 28. that the circumstances surrounding the incident "was not that
 clear." (TT April 20, 2005 p. 3-6).

1. B. Counsel's Performance Was Deficient

2. As noted, Vo has established that the improper juror contact
 3. in his case raised a presumption of prejudice under Mattox/Remmer
 4. which required an evidentiary hearing be held where the government
 5. would have the burden of rebutting this presumption to avoid the
 6. granting of a mistrial. Angulo, 4 F.3d at 846-47. The question
 7. here is thus whether Vo's counsel's performance was deficient in
 8. failing to request the latter. Two cases, Davidson and
 9. Weatherwax, are on point and compel the conclusion that this
 10. question must be answered in the affirmative.

11. In Davidson, for example, the defendant's counsel learned of
 12. an instance of "juror misconduct"⁶, but failed to bring it to the
 13. court's attention or move for a mistrial at that point in the
 14. trial. Id. Counsel testified at an evidentiary hearing that he
 15. failed to do so "because in his opinion, the conduct of the jury
 16. did not constitute juror misconduct." Id.

17. In response to the defendant's claim of ineffective
 18. assistance of counsel in his § 2255 motion, the government did not
 19. contest the fact that "the juror engaged in premature
 20. deliberation," or that this "constituted juror misconduct
 21. sufficient to warrant declaring a mistrial." Id. (citation
 22. omitted). The government nevertheless contended that trial
 23. counsel's failure to bring the matter "to the court's attention"
 24. did not constitute deficient performance because trial counsel's
 25. failure "resulted from a reasonable trial strategy." Id. at 557-

26.
 27. 6/ The specific instance of misconduct was that a member of the
 28. jury had engaged in pre-mature deliberation and eleven of them
 "voted to find [the defendant] guilty. Id.

1. 58. The district court rejected this argument for "two distinct
2. reasons." Id.

3. The court first ruled that because counsel testified that he
4. did know that the juror's actions constituted misconduct, his
5. failure above resulted from a mistake or misunderstanding of the
6. law - rather than a "strategic decision," and thus constituted
7. deficient performance under Strickland, Davidson, 951 F.supp. at
8. 558. This is consistent with the law in the Ninth Circuit. See
9. e.g. Edwards v. LaMarque, 439 F.3d 504, 513 (9th Cir. 2005)
10. (upholding the district court's finding that counsel's
11. performance was deficient, where the record revealed that
12. counsel's error resulted from a "mistake" rather than a
13. "strategic choice"); U.S. v. Span, 75 F.3d 1383, 1390 (9th Cir.
14. 1996) (Holding that "[c]ounsel's errors...were not a strategic
15. decision. They were the result of a misunderstanding of the
16. law," and were thus unreasonable, which amounted to deficient
17. performance under Strickland.)

18. Secondly, the Davidson court ruled that "even assuming that
19. the court could find some strategic motive underlying" counsel's
20. failure as mentioned above, any such strategy was "unreasonable"
21. under the circumstances and thus constituted deficient
22. performance in any event. Id. In so ruling, the court noted
23. the well established rule that "[r]easonable trial strategy must,
24. by definition, be reasonable." Id. See also Span, 75 F.3d at
25. 1390 (same).

26. In Weatherwax, counsel also failed to bring an instance of
27. juror misconduct to the court's attention that occurred during
28. the defendant's trial. The specific instance of misconduct

1. involved juror members reading a prejudicial newspaper article
 2. concerning the defendant's trial. Id. at 579. The court noted
 3. that "the uncontradicted affidavits, considered as true,
 4. reveal[ed] a disregard for the implications of the jurors'
 5. activities," and then specifically held that counsel's "failure to
 6. call the court's attention to the incident based upon
 7. indifference fell below the Strickland object standard of
 8. reasonableness. Id.

9. Here, when asked by the court whether he "want[ed] to do anything
 10. more about this," Mr. Weight's response was, "I think all that
 11. would do would be to emphasize the matter. I think it's better
 12. left alone." (TT April 20, 2005). As the improper contact
 13. involving Mr. Hanki in this case raised a "presumption of
 14. prejudice," the situation was very serious and, indeed, mandated
 15. a hearing under Mattox/Remmer. The record here thus reveals
 16. either a complete "disregard for the[se] implications" on
 17. Mr. Weight's part, and/or that he made a "mistake" or
 18. "misunderstood" (or was totally oblivious of) the law.

19. Indeed, the situation could not be "emphasized" more as the
 20. damage had already been done. Rather than a need to be "left
 21. alone" at the time, the law required - at minimum - that a
 22. "curative instruction" be given. Cf. Brande, 329 F.3d at 1177
 23. (citing lack of "curative instruction" in finding that a
 24. Mattox/Remmer hearing was necessary); Caliendo, 353 F.3d at
 25. 1153-54 (Holding that the government rebutted the "presumption
 26. of prejudice", in large part because "the judge admonished the
 27. jurors not to allow the improper encounter to influence their
 28. judgement[,]... and [] all the jurors said that their judgement

1. would not be influenced by the encounter.").

2. Accordingly, under the cases cited above, Vo has met his
 3. burden of showing that Mr. Weight's failure to request a mistrial
 4. (and/or a Remmer hearing) in this case fell far "below the
 5. Strickland objective standard of reasonable." Weatherwax 20 F.3d
 6. at 579.

7. C. Vo Was Prejudiced by Counsel's Deficiencies

8. As noted, as the record here stands, "prejudice" must be
 9. "presumed." Therefore, if the facts herein are found to be true,
 10. Vo has made out a "prima facie" case of ineffective assistance of
 11. counsel under the Strickland standard. This entitles Vo to an
 12. evidentiary hearing so that he can establish this claim.⁷ Cf.
 13. Fields, 281 F.3d at 977-78 (ruling that the success of the
 14. defendant's claim of ineffective assistance of counsel, as to
 15. counsel's handling of a juror misconduct/bias issue, depended on
 16. the success of the latter claim, which the court remanded for an
 17. evidentiary hearing.); Weatherwax, 20 F.3d at 581 (holding that
 18. _____)

19. 7/ At the evidentiary hearing, the government will have the
 20. "heavy burden... to rebut the presumption [of prejudice] by
 21. proving that the error was harmless beyond a reasonable doubt,"
Remmer I 347 U.S. at 229, and/or it must show Mr. Weight's
 22. decision not to bring the jury misconduct issue to the court's
 23. attention (or request a mistrial) was (contrary to Vo's factual
 24. allegations) "the basis of "sound trial strategy." Weatherwax,
 20 F.3d at 579-80. Of note, the Third Circuit later ruled, after
 25. the case had returned from the district court, after it remanded
 26. in the latter case, that the government had successfully
 27. established that counsel's performance was not deficient as
 28. counsel made a "reasonable tactical decision" to not raise the
 jury misconduct issue at trial. Government of Virgin Islands v.
Weatherwax, 77 F.3d 1425, 1432 (3rd Cir. 1996) Counsel's specific
 explanation, which the court found reasonable, was that he did
 not bring the latter issue to the court's attention or request a
 mistrial because he had a "jury that left [him] very happy, with
 a very happy feeling." Id. at 1430.

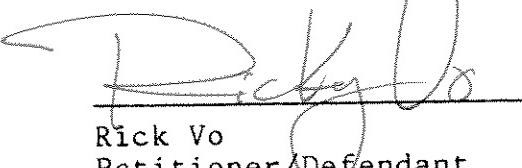
1. defendant met his burden of establishing prejudice under
2. Strickland where, due to counsel's deficient performance, a
3. valid jury misconduct/bias claim in which "proof of actual
4. prejudice is excused" (or it is "presumed") was not brought to
5. the trial court's attention.)

6. **CONCLUSION**

7. For the foregoing reasons, Defendant Vo prays that the
8. relief he requests herein will be granted.

9.
10. Dated: 9-18-07

Respectfully Submitted,


Rick Vo
Petitioner/Defendant
(In Pro Se)

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